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May 15, 2003

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PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT
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VIA HAND DELIVERY

Jeffrey Schmidt
3003 Van Ness Street, N.W., #W406
Washington, D.C. 20008

Re: Analysis of Potential Claims Against AIP

Dear Jeff:

On May 30, 2000, the American Institute of Physics ("AIP" or "the Institute") terminated your employment after you had served for nineteen years on the staff of its professional magazine, *Physics Today*. By the terms of an engagement letter dated November 18, 2002, Crowell & Moring LLP agreed "to conduct research on viable legal claims, both on the administrative and court levels, that you might have against AIP arising out of your termination," and to "draft a memorandum summarizing the results of its research evaluating potential claims."

This letter, which memorializes the results of our research, and our review of the documents, materials, and other information you have provided, constitutes the memorandum contemplated by our engagement letter. The analysis provided herein is consistent with the conclusions that I have previously discussed with you in person.[1]

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[1] As you know, the engagement letter continued: "The Firm at this time has not agreed to represent you in any litigation or administrative advocacy concerning this matter. This means that we will not bring a lawsuit on your behalf to recover money from or compel certain actions by AIP or *Physics Today*."

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A. Introduction

Based on the facts that you have provided, AIP's termination of your employment raises substantial questions, in light of the surrounding circumstances, your consistently strong evaluations, and other documented praise for your work. Accordingly, we have carefully considered a number of potential causes of action against AIP. In particular, we believe that the following causes of action merit further consideration: (1) retaliatory discharge, in violation of Title VII of the Civil Rights Act of 1964; (2) breach of contract; (3) violations of the United States Constitution, under color of state law, pursuant to 42 U.S.C. § 1983; and (4) defamation. Each will be discussed in further detail below.

For purposes of this memorandum, we will assume that your core claim would be that AIP terminated your employment for reasons relating to some aspect of your workplace activism, and not for the narrow reason that AIP has identified – *i.e.*, writing your book *Disciplined Minds* "on stolen time" (or for saying that you did). Given the positions you have advanced before the Prince George's County Human Relations Commission (where a Title VII charge remains pending), the National Labor Relations Board, and the Maryland Department of Labor regarding the reasons for your termination, and given our various discussions on this subject, your workplace activism would appear to be the strongest starting point for any cause of action.[2]

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To the extent you have raised the possibility of additional claims against the University of Maryland, I have indicated that such claims are (1) are beyond the scope of our engagement; and (2) are unlikely to succeed, based on the facts as we understand them.

[2] Of course, if you filed suit, you would be permitted to "plead in the alternative," or assert legal theories that are inconsistent, or even contradictory, in a single complaint. Thus, you could certainly allege in the alternative that you were terminated for writing *Disciplined Minds*. That allegation would likely give rise to a single, relatively narrow potential claim: retaliation for engaging in free speech protected by the First Amendment. Any such claim would be valid only if a court were to construe AIP's termination of your employment as "state action." As discussed elsewhere herein, we think that it is not likely that a court would reach such a conclusion. In addition, even were your discharge "state action," the First Amendment does not protect retaliation for all speech, but only for speech regarding matters of "public concern." *See, e.g., Peters v. Jenney*, 2003 U.S. App. LEXIS 7540,

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We have likewise considered, but eventually were not persuaded by, other possible claims, including: (1) racial discrimination in contract, pursuant to 42 U.S.C. § 1981, because, *inter alia*, there is no basis for asserting that you were discriminated against on the basis of your own race, *see, e.g.*, *Little v. United Techs., Inc.*, 103 F.3d 956, 961 (11th Cir. 1997); (2) any claim under the District of Columbia Human Rights Act, as the one-year statute of limitation expired in May 2001, *see* D.C. CODE § 2-1403.16; (3) claims for wrongful termination under either Maryland or District of Columbia law, for you have not claimed that your termination was in violation of clearly articulated public policies not otherwise protected by law, *see Wholey v. Sears, Roebuck & Co.*, 803 A.2d 482, 490 (Md. 2002); *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 35 (D.C. 1991) (wrongful discharge tort restricted to employees fired for refusal to violate statute or regulation); and (4) claims for invasion of privacy or emotional distress, as we see no indication that AIP's conduct rose to the level of "highly offensive" or "extreme and outrageous," the sort of conduct on which such claims must be premised, *see Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001) and *Chinwuba v. Larsen*, 790 A.2d 83, 102 n.8 (Md. Ct. Spec. App. 2002) (invasion of privacy); *Manikhi v. Mass Transit Admin.*, 758 A.2d 95, 113 (Md. 2000) and *Avery v. HPCS, Inc.*, 818 A.2d 175, 177 (D.C. 2003) (intentional infliction of emotional distress).[3]

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at *39 (4th Cir. Apr. 22, 2003). The subject matter of *Disciplined Minds* is probably not a matter of "public concern" within the legal meaning of that term. *See Connick v. Myers*, 461 U.S. 138, 146 (1983) (speech on "matters of public concern" "relate[s] to any matter of political, social, or other concern to the community"); *Strohman v. Colleton Co. Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992) ("personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest" not "matters of public concern"). Even if the subject matter were a "matter of public concern," you would be required to prove that your interest in expression outweighed AIP's interest in "efficient operation of the workplace," as well as "but for" causation. *E.g.*, *Peters*, 2003 U.S. App. LEXIS 7540, at *39-40; *Rush v. Rowan-Salisbury Board of Ed.*, 1997 U.S. App. LEXIS 29117, at *3-4 (4th Cir. Oct. 23, 1997); *see also DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995). Both of these elements create substantial hurdles, based on the facts are we understand them.

[3] The workplace activity that you have described is, at least on its face, within the purview of the National Labor Relations Act ("NLRA"). As you have exhausted the available administrative procedures under that Act, however, this memorandum will not further address the viability of potential claims that statute

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B. Analysis

1. Personal Jurisdiction and Choice of Law Issues

Before addressing the merits of the claims identified above, a few preliminary considerations bear mention. First is the distinction in the law between "personal jurisdiction" – *i.e.*, the fora where you may bring your claims – and "choice of law" – *i.e.*, what law will apply in whatever forum you ultimately choose. You have indicated that you would prefer to pursue legal claims in the District of Columbia; I have advised you that the existence of AIP's small auxiliary office in the District may support the exercise of personal jurisdiction by District of Columbia courts. There is no question, however, that AIP is subject to the personal jurisdiction of the Maryland courts.[4] Were you to elect to file an action against AIP in the District of Columbia, and a District of Columbia court were to dismiss that action solely for lack of jurisdiction, Maryland Circuit Court Rule 2-101(b) appears to allow for its refiling in Maryland within 30 days. There is a parallel rule in the Maryland District Courts. There is no such rule in the District of Columbia courts, or in the federal courts.

Second, wherever there is so-called "personal" jurisdiction over AIP, I have also described to you the possibility of "subject matter" jurisdiction in federal courts in those locations, if the lawsuit also has one of two characteristics: (a) there is "complete diversity" among the parties (which, unless AIP is organized under District of Columbia law, or there are other non-diverse parties in the lawsuit, there would be), and more than $75,000 in controversy; or (b) the case "arises under" federal law, as would, for example, an action asserting a violation of Title VII. *See* 28 U.S.C. §§ 1331, 1332(a). I have also described how, even if you file a case in state

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may provide. As the National Labor Relations Board has informed you, you may petition for the reconsideration of your charge "at any time," based on the presentation of new evidence. I have advised you that a request to the Board, pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, may be a possible source of "new evidence."

[4] Under the related principle of "venue," based on the facts you have provided, your potential Title VII claim may be brought only in the state and federal "judicial districts" that include College Park, Maryland. *See* 42 U.S.C. § 2000e-5(f)(3).

court, AIP might subsequently "remove" the case to federal court if it believes that at least one of these characteristics is present. *See* 28 U.S.C. § 1441(a).[5]

Third, wherever the case is brought, "choice of law" questions will remain. You live in the District of Columbia, and, at the end of your employment with AIP, worked from your home there a few days per week. However, your employment relationship with AIP was clearly concentrated in Maryland: AIP was located in Maryland, AIP personnel determined the terms and conditions of your employment (including eventually deciding to fire you) in Maryland, and the discharge itself – the primary event of legal significance – occurred in AIP's College Park offices. Accordingly, for claims arising out of your employment, or otherwise stemming from the conduct of AIP while you worked there, this memorandum will assume that Maryland law will apply. Similarly, for any federal law claims, the decisions of the United States Court of Appeals for the Fourth Circuit will apply, whenever there is not a decision of the United States Supreme Court that otherwise controls.[6] As between Maryland and the District of Columbia, the statutes of limitation applicable to the potential claims analyzed herein are the same.

You, or other lawyers that represent you, may believe there are certain tactical or other considerations that favor a particular forum, or that there are reasons to argue that other law may apply in a case that you bring. Those considerations and reasons are beyond the scope of the instant assessment.

2. Claims Pursuant to Title VII

On November 22, 2000, you filed a charge with the Prince George's County Human Relations Commission (cross-filed with the EEOC), alleging that your firing violated Title VII of the Civil Rights Act of 1964. In that charge, you stated your belief that your firing was "in retaliation for [your] complaints of disparate

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[5] You may pursue state law claims in federal court (subject to 28 U.S.C. §§ 1332(a) & 1367(a)), just as you may pursue federal claims in state court. Of note, the subject matter jurisdiction of Maryland District Courts in civil cases is limited to suits seeking $25,000 or less in damages; conversely, invoking the subject matter jurisdiction of Maryland Circuit Courts requires that at least $2,500 in damages be sought. *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 4-401, 4-402; *see also* D.C. CODE § 11-921(a)(6) (subject to exclusive federal jurisdiction, subject matter jurisdiction of District of Columbia Superior Court is unrestricted).

[6] When not to the contrary, illustrative authority from other jurisdictions may be cited or discussed.

treatment of employees (Black) not being hired in professional positions," and thus protected by the "opposition clause" of 42 U.S.C. § 2000e-3(a). On June 13, 2002, the agency determined that there was "insufficient evidence" to support your allegations. The agency subsequently granted your request for reconsideration, and your charge has again been pending in the agency since that time.[7]

In this portion of our assessment, we will only discuss our views of the strengths and weaknesses of the Title VII claim submitted to the agency. As you know, you must receive a "right-to-sue" letter before asserting Title VII-based allegations against AIP in a court of law, although you may request that the agency issue that letter before the agency has completed its investigation. Once issued, if the EEOC will not pursue your claim itself, you have 90 days to file such a complaint in court. If filed after that date, a complaint raising a Title VII claim would be barred as untimely.

A claim of retaliation based on "opposition" to activity protected by Title VII requires three showings. First, you must demonstrate a prima facie case: (1) that you engaged in activity protected by the statute; (2) that a cognizable "adverse employment action" occurred within 300 days of the date of your charge; and (3) that there was a causal connection between the two. *See, e.g.*, *Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001).

Based on the facts that you have provided, we believe that you can satisfy the first two of these requirements readily.[8] However, the law governing "causal connections" will pose an obstacle to ultimately prevailing on this claim.

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[7] In response to your charge, the agency will also investigate whether AIP violated the parallel provisions of the Maryland Human Relations Act, MD. CODE ANN. art. 49B, § 14 *et seq*.

[8] One caveat: the only "adverse employment action" that occurred within 300 days of your charge was your firing. Although the so-called "ban on private conversations" was also in place at that time, it was generally applicable, and not necessarily directed specifically at you. Accordingly, it appears that only the circumstances of your firing remain timely, although other potential adverse employment actions (*e.g.*, your negative performance review on August 17, 1999) outside that period could remain relevant as evidence of AIP's discriminatory conduct. Of course, future adverse employment actions (*e.g.*, negative employment references) may support new charges if and when they occur.

Central to proving a causal connection is temporal proximity. In *Dowe v. Total Action Against Poverty*, 145 F.3d 653 (4th Cir. 1998), the Fourth Circuit ruled that "[a] lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action ... negates any inference that a causal connection exists between the two." In some reported cases, courts have found that as little as one month is too long. *See, e.g.*, *Nelson v. J.C. Penney Co.*, 75 F.3d 343 (8th Cir. 1995). According to the information that you have provided, the last incident of protected activity occurred no later than nine months in advance of your firing, and may have occurred as long as thirty months before.[9] It is difficult to state with certainty the ultimate effect of these gaps, but they render proving a causal connection difficult.

Furthermore, the facts suggest that AIP's unfavorable conduct toward you began before your first recorded incident of activity specifically protected by Title VII, which arguably supports the inference that any "retaliation" by AIP was prompted by something other than your protests of its use of race in employment decisions. Lastly, between the time your protected activity appears to have begun and the time of your termination, your file includes evidence of a handful of positive employment actions by AIP, including the approval of your request for part-time status in the fall of 1999, and "glowing" praise for your work (your words, according to the chronology you have prepared) only a month before you were discharged. These facts also mitigate against your ability to prove the requisite causal connection.

Having said that, a pattern of animosity by an employer can sometimes provide a sufficient basis for establishing a causal connection, despite a delay in the allegedly retaliatory act. *See, e.g.*, *Harrison v. Metropolitan Gov't of Nashville*, 80 F.3d 1107, 1119 (6th Cir. 1996) (when "the plaintiff's activities were scrutinized more carefully than those of comparably situated employees, both black and white, and ... the defendants took every opportunity to make his life as an employee unpleasant," plaintiff could establish prima facie case despite fifteen months between protected activity and alleged retaliation). Therefore, to the extent AIP repeatedly criticized you, or sought to deter certain behavior by you in the workplace, a court may find that such a pattern indicates that your firing was simply the "last straw" in ongoing retaliatory activity. Naturally, these issues will be a leading aspect of any discovery that you take against AIP in a Title VII action.

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[9] Your charge claims that the date of your latest complaint protected by Title VII is August 17, 1999. Apparently, however, the only such complaint documented is dated November 5, 1997.

If you do establish a causal connection, however, and thereby your prima facie case, you must still prove a substantive Title VII violation by a preponderance of the evidence. In our view, the foremost obstacle to this portion of your case will be the demanding requirement that you show "but for" causation – that is, that AIP would not have terminated your employment but for your protected conduct. *See, e.g., Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). Your file seems to concede that AIP did not fire you until it read about your statements in *Disciplined Minds*. If a trier of fact found that these statements were merely *part* of the reason AIP discharged you when it did, the "but for" test would not be met. *See id.*

In sum, we conclude that while you may be able to establish a prima facie case of retaliation under the opposition clause of Title VII, there would be substantial hurdles to clear in order to prevail on the merits.

3. Breach of Contract

As we have discussed, we believe a breach of contract claim on the facts that you have provided is suspect, and that a court would likely seriously entertain a motion to dismiss such a claim, for at least two reasons: (1) under Maryland law, the "employment at will" doctrine remains robust; and (2) the at-will disclaimers contained in AIP's employee handbook would likely be enforced, and would likely override any alleged modifications to your employment relationship with AIP.

It is well-established in Maryland that employment is presumptively "at-will," meaning that either party may terminate the employment relationship at any time, for any reason or for no reason. *See, e.g., University of Baltimore v. Iz*, 716 A.2d 1107 (Md. 1998); *Suburban Hosp., Inc. v. Dwiggins*, 596 A.2d 1069 (Md. 1991); *Adler v. American Std. Corp.*, 432 A.2d 464 (Md. 1981); *see also Page v. Carolina Coach Co.*, 667 F.2d 1156, 1158 (4th Cir. 1982).

There is no formal employment contract between you and AIP modifying the at-will relationship. Moreover, AIP policies, including the employee handbook that was regularly distributed throughout the Institute, and which you received each time, expressly state that employment with AIP is at-will, and that it may be terminated in accordance with the presumptions of Maryland law.

Most significantly for this analysis, in May 1996, AIP issued an employee handbook containing the following "at-will disclaimer":

> neither the Handbook's policies nor any other representations made by a management representative, at the time of hire or at any time during employment, are

> to be interpreted as a contract between the Institute and any of its employees.

AIP apparently released the next version of its handbook in June 1999, and it includes a disclaimer with materially identical language.[10] Based on our understanding of the facts, and existing legal precedent, these at-will disclaimers would likely be enforced, even in the face of certain written statements that you believe may have altered the employment relationship. In particular, you point to an e-mail from Stephen Benka, dated November 17, 1996, which states, in relevant part:

> Nobody's job will be jeopardized by speaking freely and airing their views on matters pertinent to the magazine. ... There are, however, no guarantees of lifetime employment at AIP for any of us, from the Publisher on down (and up). We all have jobs to do, and we must do them well. Basing job security on job performance is sound. That won't change.

Although Mr. Benka is making representations to the *Physics Today* staff, it is unlikely under the law that these statements have the force and effect of a contract (*i.e.*, an obligation to refrain from terminating your employment on any basis other than performance), especially given the contractual disclaimers cited above. *See, e.g.*, *Fournier v. United States Fidelity & Guaranty Co.*, 569 A.2d 1299, 1303-04 (Md. Ct. Spec. App. 1990). Such disclaimers are generally intended to foreclose the possibility that statements like Mr. Benka's will give rise to contractual obligations. *See, e.g.*, *Castiglione v. Johns Hopkins Hosp.*, 517 A.2d 786, 794 (Md. Ct. Spec. App. 1986) ("[j]ustifiable reliance is precluded where ... contractual intent has been expressly disclaimed" (citing cases)) (quoted in *Fournier*, 569 A.2d at 1303-04).

Any claim that the AIP Handbook did not apply and/or was not enforced at *Physics Today* is likely meritless. On its face, the Handbook does not exclude from

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[10] Interestingly, the other copies of AIP employment handbooks that you provided show that this language was modified over time. In January 1982, the handbook did not include a disclaimer at all; in September 1988, a disclaimer appeared, stating that "neither this handbook nor any other communication by a management representative is intended to create, in any way a contract of employment"; in March 1990, the disclaimer dropped that language, but the provision reappeared in May 1996.

its purview *Physics Today* or any other division of AIP, making that issue highly fact-bound, and likely very difficult to prove in accordance with the requisite burden. Furthermore, this fact may be inconsequential, as the Handbook itself disavows imposing contractual duties on either AIP or its employees. Only the disclaimer purports to be a contract, and, at bottom, only the disclaimer is germane to this analysis. Indeed, Maryland courts hold that "it is not necessary that an employee actually read a disclaimer in order for it to be valid." *Elliott v. Board of Trustees*, 655 A.2d 46, 51 (Md. Ct. Spec. App. 1995).

Second, the potential terms of any contract that Mr. Benka's e-mail may have created are dissimilar to the precise obligation to which you have stated AIP agreed.[11] Over the course of our discussions, you have suggested that the e-mail indefinitely forfeited AIP's right to fire its employees for "all reasons other than job performance." We do not believe a court would be inclined to endorse such an expansive view of the contract's terms.[12]

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[11] The best evidence of a contract's meaning is typically its plain terms. Mr. Benka's e-mail states that "*[b]asing* job security on job performance is sound" (emphasis added). Such a statement does not indicate that "job performance" would be the *only* factor in determining "job security" at AIP. Rather, if job performance triggered a more comprehensive review, and was ultimately rendered only a minor reason for the termination of a particular individual's employment, that would be consistent with Mr. Benka's statement as well. In addition, we would expect AIP to argue that Mr. Benka's e-mail "expresses a mere hope or expectation," insufficient to have modified the at-will relationship. *See Hillsman v. Sutter Community Hospitals*, 1984 Cal. App. LEXIS 1821, at *7 (Cal. Ct. App. Mar. 27, 1984) (employer statement that it "look[ed] forward to a long, pleasant, and mutually satisfactory relationship" did not modify at-will relationship).

[12] In our view, a claim that the e-mail quoted above contractually prohibited AIP from terminating your employment based on an exercise of "free expression" in the workplace, and that AIP subsequently breached that contract, is not likely to succeed. In addition to arguing that the handbook's disclaimer preserved the employment at-will relationship, AIP would probably argue that it terminated you not for your exercise of free expression at the workplace, but for writing *Disciplined Minds* on "time" that was "stolen" from AIP, for disparaging AIP in *Disciplined Minds*'s pages, and/or for being disruptive in the workplace. Said differently, even if a court were convinced that the e-mail from Mr. Benka created such a contract, AIP would have substantial arguments that it did not violate that contract by

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Third, even if Mr. Benka's e-mail created a contract, regardless of its terms, AIP is likely to assert that the June 1999 Employee Handbook – specifically, the disclaimer cited above – terminated that contract, and restored all employment relationships to at-will.[13]

Overcoming the presumption of at-will employment, in the absence of a contract, is very difficult. Proving a contract will require that you establish, by a preponderance of the evidence, a "meeting of the minds" on all material terms of the contract you claim was in existence, a degree of "definiteness" to those terms, and the exchange of legal "consideration" for them. On the facts that you have provided, we believe that a claim for breach of contract against AIP is not likely to succeed.

4. Claims Based on 42 U.S.C. § 1983

If AIP, acting under color of state law, abridged or violated rights guaranteed to you by the United States Constitution (or, in some circumstances inapplicable here, other federal laws), this statute would provide a cause of action against AIP for that conduct. *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999). Because this statute (as well as the Constitution itself) applies only to "state action," demonstrating that AIP's

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terminating your employment following the publication of a book that you stated was written "on stolen time," and that arguably disparages AIP.

If confronted with an argument that AIP discharged you for "cause," you might respond with the finding of the Maryland Department of Labor (*i.e.*, that AIP did not terminate your employment on the basis of "misconduct"). However, courts are unlikely to give that determination preclusive effect, and may not permit it to be admitted into evidence, given the different standards that apply to unemployment compensation determinations.

[13] You have highlighted a second document on this point, a September 14, 1999 memorandum from Mr. Benka to you, granting your request for part-time status, and approved by the signature of James H. Stith. Assuming *arguendo* that this memorandum is "an agreement, in writing ... and signed by [an] Institute official" (according to the June 1999 handbook, the only sort of document capable of "modifying th[e] relationship" of at-will employment at AIP), the terms of the memorandum have no bearing on how or why AIP could lawfully terminate your employment. Rather, they merely indicate that you began to work part-time, in exchange for a proportionate reduction in your salary.

termination of your employment was state action is a critical threshold question. *See, e.g.*, *UAW v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir. 1995); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) ("in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement ... are identical"); *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

You have indicated that AIP is an "affiliate" of the University of Maryland, itself unquestionably a state actor. AIP moved to College Park from New York in 1993, and the draft affiliation agreement that you have provided, dated November 17 of that year, indicates that "[t]he prospect of synergy between the [University] Physics Department and [AIP] was, after all, an important factor in the decision to locate [AIP] in Maryland." Pursuant to this agreement, and from what I understand from you, AIP employees receive staff identification cards, granting them the access to University facilities and events that employees of the University itself enjoy. The University bus also stops at the AIP offices (although they are not located on campus), and AIP employees may use the bus system, unlike the public at-large. You have stated that the University extends these benefits to individuals who its affiliates identify as employees, and terminates them when informed by the affiliate that an employment relationship has ended. You have stated that other University "affiliates" include Riggs Bank and the federal Department of Agriculture.

Although substantial, we do not believe these various connections are sufficient to convert your termination by AIP into state action under the law. This doctrine is fairly complex, and often subjective, but is currently summarized by a two-part test. Applying this test, formulated in the decision of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618-22 (1991), courts first determine "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and, second, assess "whether the private party charged with the deprivation could be described in all fairness as a state actor."

The second of these factors is generally more significant, and, in at least two decisions, the United States Supreme Court has determined that they are insufficient to convert otherwise private conduct into state action, when the state arguably ratifies private conduct in the application of a neutral policy or law. That appears to invalidate the potential theory in your case, which would contend that action taken by the University of Maryland (*i.e.*, revoking the benefits it extended to you as an affiliate's employee) in response to your firing by AIP converts that firing into state action. *See, e.g.*, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In our view, without evidence that

the University directed or benefited from your firing, the University's response does not render AIP's conduct "state action."

Given this assessment of the threshold state action element, we are doubtful that any § 1983 claim against AIP will succeed. Assuming *arguendo* that you could establish state action in your termination, the facts as we understand them suggest two potential constitutional violations: (1) that your termination without a hearing has deprived you of due process of law, and (2) that you were retaliated against for exercising First Amendment rights.

The first of these theories, however, depends upon the existence of a contract, as the law does not recognize a property interest protected by the Fourteenth Amendment in at-will employment. *See, e.g.*, *Bowers v. Town of Smithsburg*, 1999 U.S. App. LEXIS 1648, at *5 (4th Cir. Feb. 5, 1999); *see also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). Likewise, the second, as mentioned in footnote 2, requires both (a) reliance upon a theory fundamentally inconsistent with those you have asserted to date, and (b) that the speech allegedly prompting the retaliation (*i.e.*, the writing of *Disciplined Minds*) is protected by the First Amendment at all.

For the reasons stated, we believe that neither of these claims presents a strong likelihood of success.

5. Claims for Defamation

The final claim we believe merits consideration is common law defamation, based on statements that AIP personnel may have made about you since your termination. Under both District of Columbia and Maryland law, claims for defamation must be filed within one year of the date of the publication of the allegedly defamatory statement. *See* D.C. CODE § 12-301(4); MD. CODE ANN., CTS. & JUD. PROC. § 5-105. In actions for defamation, the law of the jurisdiction(s) where the statement is made, or, if different, where the statement causes the plaintiff harm, may potentially apply.

Defamation claims are often difficult to prove, and infrequently support substantial damage awards. Yet the law does not confer a right to defame others, and so such claims, subject to the types of concerns discussed herein, should not be ruled out.

Under Maryland law, a claim for defamation requires proof of the following elements: (1) a defamatory statement, or "one which tends to expose a person to

public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person"; (2) falsity, or that the statement is "not substantially correct"; (3) fault; and (4) injury. *E.g.*, *Chesapeake Publishing Co. v. Williams*, 661 A.2d 1169, 1174 (Md. 1995); *Shapiro v. Massengill*, 1995 Md. App. LEXIS 105, at *40 (Md. Ct. Spec. App. June 1, 1995).[14] District of Columbia law is materially the same. *See Carter v. Hahn*, 2003 D.C. App. LEXIS 219, *6 (D.C. Apr. 17, 2003) (citations omitted); *see also Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) ("In the District of Columbia, a statement is defamatory if it tends to injure [the] plaintiff in his [or her] trade, profession or community standing or lower him in the estimation of the community"); *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000). In both jurisdictions, unprivileged statements of opinion are generally not actionable, except when they "imply an assertion of objective fact." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990).

Traditionally, the category of "libel per se" includes, *inter alia*, written statements that are:

> spoken of a person in his office, trade, profession, business or means of getting a livelihood, ... [and] which charge him with fraud, indirect dealings or incapacity and thereby tend to injure him in his trade, profession or business.

Kilgour v. Evening Star Newspaper Co., 53 A. 716, 717 (Md. 1902). Statements that charge the subject with a crime are also among those considered "libel per se." *See Shockey v. McCauley*, 61 A. 583 (Md. 1905); *Johnson v. Johnson Publishing Co.*, 271 A.2d 696, 698 (D.C. 1970). As a result, such statements are thus actionable without the need for pleading of "innuendo and colloquium," demonstrating the defamatory content, or for proof of "special damages," actual pecuniary loss that results from the statements at issue. *See Metromedia, Inc. v. Hillman*, 400 A.2d 1117, 1119 (Md. 1979).

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[14] In response to a claim for defamation, AIP might allege that you are a "public figure," and therefore must prove the additional element of "actual malice." *See New York Times v. Sullivan*, 376 U.S. 254, 279-90 (1964); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (actual malice requirement applies only to statements involving matters of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defining limited purpose public figures).

Later Maryland decisions have made clear that the recovery of more than nominal damages, even in a "libel per se" case, does require a showing that the defamatory statement caused the plaintiff's reputation some harm, and that the amount of damages available should be limited to the extent of that harm. *See IBEW, Local 105 v. Mayo*, 370 A.2d 130, 135 (Md. 1977) ("damage ... [must] flow from the proven damage to reputation). Damages for defamation cannot be presumed. *See Hillman*, 400 A.2d at 1119; *see also The Hearst Corp. v. Hughes*, 466 A.2d 486 (Md. 1983). Punitive damages are not allowed. *See Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (Md. 1976). Under the law of the District of Columbia, while damages are also tied to the extent of injury to the plaintiff's reputation, punitive damages may be recovered when "actual malice" is proved by clear and convincing evidence. *See Ayala v. Washington*, 679 A.2d 1057, 1068-1070 (D.C. 1996).[15]

As potentially defamatory statements, you have provided us copies of two e-mail messages from Marc H. Brodsky, AIP's Executive Director, both dated earlier this year.[16] In both messages, however, Mr. Brodsky is arguably only repeating or paraphrasing your own statements from *Disciplined Minds* (*i.e.*, that the book was written on "stolen time"), and apparently is transmitting those messages only to a single individual, who initiated the contact to support your reinstatement. Such a case may involve "libel per se" under applicable law. But where the allegedly defamatory statement was originally made by the plaintiff himself; where the scope

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[15] Subject to the great difficulty of proving state action on these facts, if false statements were the basis for AIP's termination of your employment, those statements might support a separate § 1983 action based on deprivation of your liberty interest. This claim would not depend on the existence of a contract, but would require showings that (1) AIP "has published false statements" about you; (2) that "th[o]se untruths are preventing [you] from securing similar employment"; and (3) that the false information in question "was of such a stigmatizing nature that it virtually foreclosed [your] freedom to take advantage of other employment opportunities." *Leese v. Baltimore County*, 497 A.2d 159, 169 (Md. App. 1985). In addition, success on the claim apparently would provide you only "an opportunity to refute the charge," or "to clear [your] name." *Roth*, 408 U.S. at 573 & n.12; *see also Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

[16] In any such lawsuit for defamation, an initial consideration will be identifying the proper defendant. You will want to consider whether Mr. Brodsky made any statement "within the scope of his employment," which, under the legal doctrine of *respondeat superior*, will determine whether the statement is properly attributed to Mr. Brodsky individually, or instead to AIP.

of the intended publication is relatively limited; and where the person(s) receiving the statement defend the plaintiff, and are likely already to know the plaintiff's and defendant's respective version of events, we believe that prevailing in an action for defamation would be a challenge.

C. Conclusion

As you continue weighing possible remedies for the termination of your employment at AIP, we hope that you find this assessment useful. We have very much enjoyed serving you in this capacity, and regret that our view of existing law, as applied to the facts you have provided, does not justify further commitment of the Firm's limited resources for *pro bono* representation to your case. While we will welcome questions about this memorandum (including meeting with you at the Firm), this letter will discharge the terms of your current engagement of Crowell & Moring LLP.

However, as we have discussed, this document, as well as its contents and all other aspects of our representation of you, will remain protected by the attorney-client privilege,[17] and will not be disclosed by us without your advance authorization. In addition, because you hold the privilege, we caution you that you are also capable of waiving it, even when you may not intend to do so. If you are considering disclosing the contents of this memorandum or other aspects of our representation to third parties, under circumstances that are not themselves protected by law, we recommend that you first seek legal advice as to the effect of that disclosure on your privilege.

As we have discussed several times, the applicable statutes of limitation for your possible claims for breach of contract and any violation of 42 U.S.C. § 1983 expire on May 30, 2003. *See* D.C. CODE § 12-301(8); MD. CODE ANN., CTS. & JUD. PROC. § 5-101. That means that any complaint alleging these causes of action must be filed with an appropriate court on or before that date. As a result, if you remain interested in making those claims in court, you should act promptly to preserve your rights. Court rules do not require that you have legal representation to file a complaint.

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[17] This document is also subject to the legal privilege for attorney work product. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *see also* FED. R. CIV. P. 26(b)(3).

We wish you the best, and sincerely hope that you will keep in touch.

Warmest regards,

F. Ryan Keith

Attachment (Table of Cited Cases)

cc: Kris D. Meade, Esq.
Susan M. Hoffman, Esq.

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TABLE OF CITED CASES

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